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IN THE

Supreme Court of the United States

October Term 1988

CENTRAL MILK PRODUCERS COOPERATIVE,
Petitioner,

vs.

NATIONAL FARMERS ORGANIZATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY OF CENTRAL MILK PRODUCERS COOPERATIVE TO BRIEF OF NATIONAL FARMERS ORGANIZATION IN OPPOSITION TO PETITION

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I. NFO's Lost Membership Dues And Marketing Fees Damage Claim Does Not Arise "By Reason Of" Injury To Competition In The Market Restrained By Petitioners' Antitrust Violation.

NFO's Opposition Brief ("Br.") is remarkable for its studied avoidance of the terms "membership dues" and "checkoff fees" (NFO II, 293a) and the central issue presented by the CMPC Petition. The question presented by the Petition is not whether a direct competitor and target of Petitioners' conspiracy has standing to sue under §4 of the Clayton Act to recover damages for loss resulting from injury to competition in the market restrained by Petitioners' antitrust violation (Br. at 12). Standing, in such a case, is conceded. The focal issue which the Petition addresses, and NFO avoids, is the nature of the damages which NFO seeks to recover—whether membership dues and marketing fees "damages resulting from NFO's having been prevented from achieving the growth in its dairy program in the Midwest market which it would have achieved but for the conspiracy" [1] are recoverable as antitrust damages where the product market restrained is the sale of raw milk to handlers. (NFO II, 257a, 261a-264a).

NFO's Brief elides the difference, recognized by the Eighth Circuit, between its *member's* competitive injury in the form of "price reduction" damages resulting from Petitioners' "predatory conduct" in forcing NFO to sell milk at reduced prices (NFO II, 292a) and NFO's "lost dues and fees" damages resulting from the derivative adverse effect of the "price reduction" on NFO's ability to attract members because "by virtue of selling at lower prices, NFO may have lost members or, in turn, marketing volume" (NFO II, 292a).

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[1] NFO Legal Brief Re Damages at 1399-1400 (App. I, 607a).

NFO's dues and fees damage claim resulting from its stunted membership growth is not for the lost profits that it would have made as "a competitor in the market in which trade was restrained." *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 539 (1983). (*AGC*). Those "price reduction" damages, the Eighth Circuit held, are not recoverable by NFO but only by the members "because NFO is a nonprofit entity which paid producers the proceeds of its sales efforts after deducting out certain marketing expenses. . . ." (NFO II, 292a).

NFO argues that in *AGC* the Court held that the contractors "whose position was identical to NFO's" would have been entitled to sue (Br. at 13) but fails to note that the damage recovery by the contractors, in that case, would have been for lost profits from "alleged restraints in the market for construction contracting and subcontracting" (459 U.S. at 527) not, as is the case here, for damages in a different "membership market" for the sale of NFO's collective bargaining services.

Finally, there is no danger that denial of a treble damage remedy to NFO for lost membership dues and fees will permit antitrust violators to go unpunished or leave their victims without a remedy. (Br. at 13). There was nothing to preclude the directly affected milk buyers or dairy farmers allegedly injured by Petitioners' "predatory" conduct from suing for injury directly attributable to such conduct.

II. Respondent's Arguments Reinforce The Need To Resolve The Conflict Among The Circuits Concerning Requirement Of Relevant Market Definition In Conspiracy To Monopolize Cases.

NFO seeks to escape from the conflict created by decisions which have dispensed with the proof of a relevant market in §2 conspiracy cases by mischaracterizing the Eighth Circuit's decision as a *per se* case. (Br. at 7). NFO can run but it cannot hide from the decision below. Affirming dismissal of NFO's actual and attempted monopolization claims because NFO had failed to prove a relevant geographic market (NFO II, 259a), the Eighth Circuit specifically relied on *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1971) and its progeny to dispense with any requirement for proof of a relevant market in a §2 conspiracy case. (NFO II, 238a). The Eighth Circuit did not find that Petitioners' conduct was illegal *per se*.[2] Had it done so, reliance on *Consolidated Laundries* would have been superfluous.

NFO must accept the Eighth Circuit's decision for what it is: a departure, with other conflicting circuits, from the Rule of Reason standard that this Court has attempted to fashion over the last several years. Curiously, NFO does not defend the Eighth Circuit's and the conflicting circuits' decisions to dispense with proof of a relevant market in §2 conspiracy cases; neither does it defend the progeny of *Consolidated Laundries*—cases which challenge mergers without consideration of market shares, restraints involving single brand prod-

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[2] NFO's attempt to assert a *per se* theory on appeal after trial as a Rule of Reason case was rejected by the Eighth Circuit. It held, simply that "[Petitioners'] market power is sufficient to render their conduct unlawful even under the rule of reason." (NFO II, 260a, n.16).

ucts, forward integration by manufacturers into distribution, predatory pricing with specific intent to monopolize but no barriers to entry, and new offenses such as joint attempts to monopolize. (Petition at 27.) Instead, NFO defends Petitioners' cases which require proof of a relevant market but distinguishes them from this case on the spurious grounds that this case involves either *per se* conduct, *infra*, or something called "horizontal predatory conduct." (Br. at 18).

This Court long ago abandoned a tyranny of labels to avoid hard economic analysis. This Court has never created a category of conduct called "horizontal predatory conduct," much less one which does not require an analysis of competitive effects in a relevant market. *See, FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460 (1986). (Petition at 25). Moreover, the conduct which NFO labels as "horizontal predatory conduct" in this case involves such conduct as joint petitioning of the United States Department of Agriculture concerning NFO's cooperative qualifications under the Federal Milk Marketing Orders, and responsive "predatory" price cuts by Petitioners to NFO's raw milk sales. None of this conduct can be examined without reference to a properly defined relevant product and geographic market and an assessment of market power within that market.

NFO seeks support for dispensing with the requirement of relevant market definition in a Rule of Reason case by reliance on decisions in other circuits which similarly do not require proof of a relevant market in attempt or conspiracy to monopolize cases. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980), *cert. denied*, 421 U.S. 921 (1981) (citing *Consolidated Laundries* and *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377

U.S. 993 (1964)) (Br. at 19). It is true that the Eighth Circuit's decision in this case and the decisions dispensing with proof of a relevant market in attempt or conspiracy to monopolize cases share the same common misinterpretation of the Sherman Act. Neither attempts to monopolize nor non *per se* conspiracies should be allowed to proceed without proof of a relevant market in which to assess the competitive effect of the antitrust defendant's conduct.

This is particularly true in private treble damage actions where the proper definition of a relevant geographic market is indispensable for measuring damages. In this case, the district court rejected as incredible NFO's expert's testimony on damages. (NFO III, 153a). Petitioners' evidence showed that NFO's membership growth in their proferred relevant "damage" market surpassed their growth in other areas that were unaffected by Petitioners' alleged conduct. (NFO III, 110a). In contrast, NFO's expert improperly compared NFO's performance in one portion (the "test market") of NFO's "relevant market" with its performance in another portion of the same "relevant market" to conclude that there was a difference in NFO's growth allegedly resulting from Petitioners' conduct.

Acceptance of this evidence alone by the Eighth Circuit (after its rejection by the district court) underscores the confusion created by failing to properly define a relevant economic market in a private treble damage action. Common sense and common logic shows the incongruity of adopting as a "test market," performance in a segment of what purports to be a "market" to provide the basis for measuring damages resulting from stunted growth in the remainder of that same "market." If a seller's "market" performance in one part of a geographic area varies substantially from his performance

in a different part of the same area, the geographic area, by definition, is not a "relevant geographic market."

This case thus provides the perfect textbook example for this Court to discuss the need for proof of a relevant market in non-*per se* §1 and §2 conspiracy to monopolize cases to assess market impact. This is also the case and this is the time to address and resolve the conflict among the circuits concerning the requirement of proof of a relevant geographic market in conspiracy to monopolize cases under §2 of the Sherman Act.

Respectfully submitted,

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